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NO. 84-1916

In The

Supreme Court of the United States

October Term, 1984

DAVID BOLLING,

Petitioner,

V.

RITA BAKER,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Texas

RESPONDENT'S BRIEF IN OPPOSITION

BRUCE ROBERTSON, JR.
1825 National Bank of
Commerce Building
San Antonio, Texas 78205
(512) 225-4001

Counsel of Record for
Respondent, Rita Baker

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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QUESTIONS PRESENTED FOR REVIEW

I. IS THE STATE APPELLATE COURT REQUIRED TO CONDUCT AN INDEPENDENT REVIEW OF THE TRIAL COURT'S FINDINGS OF ACTUAL MALICE IN A PRIVATE DEFAMATION SUIT?

II. WAS THE PETITIONER DENIED EQUAL PROTECTION BECAUSE THE TEXAS SUPREME COURT DISMISSED HIS APPLICATION FOR WRIT OF ERROR?

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DAVID BOLLING,

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On Petition for Writ of Certiorari to the Supreme Court of Texas

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Rita Baker brought this private defamation suit against David Bolling, who is neither a media nor a pub-

lisher defendant. She was one of his employees. He discharged her and then summoned her six fellow employees to a meeting and told them that she was dishonest, had lied, could not be trusted in her work, and was disloyal and deceitful.

The jury found that Bolling's statements were false and were made with actual malice, that is, with knowledge that they were false or with reckless disregard for the truth. The jury further found that petitioner's statements were actuated by "ill-will" malice. It awarded respondent actual and exemplary damages.

Under Texas common law, petitioner's statements were accorded a conditional privilege, and for this reason the question of actual malice was submitted to the jury.

The court of appeals reviewed petitioner's no evidence (legal insufficiency) point of error as well as his factual insufficiency point and overruled both. In doing so, the court of appeals afforded petitioner the independent review of the jury's actual malice finding, which he now says was denied to him. Petitioner's motion for rehearing was overruled by the court of appeals. He applied to the Supreme Court of Texas for writ of error. The application was dismissed for want of jurisdiction.

It was only in his motion for rehearing in the supreme court that petitioner raised the issues now presented in this Court.

REASONS FOR DENYING THE WRIT

I. IS THE STATE APPELLATE COURT REQUIRED TO CONDUCT AN INDEPENDENT REVIEW OF THE TRIAL COURT'S FINDINGS OF ACTUAL MALICE IN A PRIVATE DEFAMATION SUIT?

Petitioner argues that he was denied an independent review of the jury's actual malice finding by the Texas Court of Appeals and that the Texas Supreme Court compounded that error by not assuming jurisdiction of the case to correct the court of appeals. For three reasons, this issue is not appropriate for review.

A. The Independent Review Question Was Not Seasonably Raised In The State Courts.

This first issue is obscured by petitioner's attempt to blame the Texas Supreme Court for the court of appeal's alleged failure to grant him a *de novo* or independent review of the actual malice finding. This indirect attack was necessitated by petitioner's failure to urge his complaint at the proper time, which was when he was in the court of appeals. If he was truly entitled to such a review, he should have requested it in his initial brief filed in the court of appeals. He failed to do this. *See* A1-A3. He also neglected to complain in his motion for rehearing filed in that court. *See* A4-A5. And finally, he failed to assign as error this alleged denial of an independent appellate review in his application for writ of error in the state supreme court. (Pet. App., pp. A-6 through A-9.) It was not until he filed his motion for rehearing in the supreme court that petitioner complained of the harm done to him in the intermediate appellate court. This was too late. *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945).

B. There Is No Conflict Of Decisions.

Petitioner has seized upon this Court's decision in *Bose Corp. v. Consumers Union of United States, Inc.*, — U.S. —, 104 S.Ct. 1949 (1984) to prop up his tardy argument that he was entitled to, but denied, an independent review by the state appellate courts. He attempts to create a conflict between this case and *Bose* by misrepresenting the character of the appellate review he was actually granted by the Texas courts, which was, in effect, an independent review. This is discussed immediately below. But, even if he was denied such a review, petitioner alludes to no case, state or federal, which conflicts with the decision in this suit. He is required to do this. U.S. Sup. Ct. Rule 17, 28 U.S.C.A. The decisions cited by petitioner all deal with media defendants and/or public plaintiffs. This is also true of *Bose,* with its public figure plaintiff and media defendant. Moreover, in *Bose* this Court held that the "clearly erroneous" standard [Federal Rule of Civil Procedure 52(a)], should not be utilized in reviewing an actual malice finding in a media case. In this suit, the Texas courts did not employ the clearly erroneous standard because it is a concept foreign to the appellate procedure of that state.

This is simply not a case where the state court has decided a question of federal law, much less an important one. It is a private slander suit in which the jury found actual malice. Its place in the First Amendment spectrum is not even near the line that "must be drawn" between speech that is unconditionally guaranteed and that which may be regulated. It is rather at the opposite end of the spectrum from *New York Times v. Sullivan*, 376 U.S. 254 (1964).

C. The Petitioner Was Granted An Independent Review Of The Actual Malice Finding.

The petitioner has misrepresented the nature and scope of the appellate review he was given by the court of appeals. In Texas, an appellant is allowed to make one or both of two distinctly different attacks upon the sufficiency of the evidence supporting a finding of fact by the jury.

The first challenges the legal sufficiency of the evidence. It is often called a "no evidence" point and is considered to present a question of law. The appellate court in deciding such a point of error considers only the evidence and inferences tending to support the finding and disregards all evidence and inferences to the contrary. *Garza v. Alviar,* 395 S.W.2d 821, 823 (Tex. 1965).

Petitioner would have this Court believe that the court of appeals restricted its review to his no evidence attack upon the actual malice finding. *See* pp. 11-12 and 16-18 of the petition. He argues that such a restriction denied him the independent review required by *Bose*. It is true that the court of appeals first considered petitioner's no evidence point of error and in doing so looked only at the evidence and inferences tending to support the actual malice finding. But, then it immediately turned to his factual insufficiency point. (Pet. App., p. A-22.)

In its approach to a factual insufficiency point of error, a Texas court of appeals is required to consider and weigh all of the evidence in the case. *In re King's Estate,* 244 S.W.2d 660, 661 (Tex. 1951). A factual insufficiency point presents a question of fact. No presumptions against the appellant are invoked by the appellate court.

The court of appeals entertained petitioner's legal *and* factual sufficiency challenges and in doing so considered "all the evidence in the case". It fully discussed such evidence before overruling both points of error presented by petitioner. (Pet. App., pp. A-24 through A-28.) Before beginning, however, the court indulged in a presumption *against* the respondent. It stated: "Where an utterance is qualifiedly privileged the law presumes good faith and want of malice. *Jackson v. Cheatwood,* 445 S.W. 2d 513 (Tex. 1969)." (Pet. App., p. A-23.)

Thus, the petitioner was accorded every right he could claim under *Bose* and *New York Times v. Sullivan.* The court of appeals made an independent examination of the whole record. It exhibited an acute awareness of the constitutional principles which have been enunciated by this Court. Its discussion of the term "reckless disregard" evinces such an awareness. (Pet. App., pp. A-21 through A-22.)

The manner in which Texas appellate courts treat a no evidence or legal insufficiency challenge is admittedly similar to that employed by federal courts with their clearly erroneous standard found in Federal Rule of Civil Procedure 52(a). This standard was the focal point of this Court's attention in *Bose.* But, the Texas court of appeals did not stop after deciding petitioner's no evidence point. It continued and considered the whole record in light of his factual insufficiency point, and in doing so, it applied the presumption of good faith and want of malice *against* respondent.

In his discussion of the independent review issue, petitioner becomes lost in a maze of his own making.

Articles 1728 and 1821 of the Revised Civil Statutes of Texas (Petition, pp. 8-9) provide that judgments of the courts of appeals are final in certain cases, i.e., county court, slander, and divorce suits, election contests, and appeals from interlocutory orders. An exception exists where there is a dissenting opinion in the court of appeals or where the court of appeals' decision conflicts with that of another court of appeals or the supreme court. The Texas Supreme Court has, however, held that if an opinion of a court of appeals conflicts with preemptive federal law, then it, the Supreme Court, has jurisdiction to hear the case even though it is one that it could not ordinarily consider, e.g., a divorce or slander case. *Eichelberger v. Eichelberger,* 582 S.W.2d 395 (Tex. 1979).

Petitioner argues that the Texas Supreme Court should have taken jurisdiction of his appeal because the court of appeals' decision conflicts with this Court's in *Bose.* But, the Supreme Court of Texas must have considered this alleged conflict and found it to be nonexistent. Otherwise, it would have taken jurisdiction of petitioner's appeal and reversed the lower courts' decisions. In other words, it presumably followed the jurisdictional precept it had itself announced in *Eichelberger.*

Petitioner states in a rather oblique manner that the fate of this case is somehow dependent upon what this Court does in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., cert. granted,* — U.S. —, 104 S.Ct. 389 (1983). The two cases are similar in that both are defamation cases involving private plaintiffs and non-media defendants. But a distinction of great magnitude exists—one that renders *Dun & Bradstreet* totally inapposite. In this

case there was a finding of actual malice. In *Dun & Bradstreet,* there was not. Therefore, all of the constitutional strictures upon libel cases mandated by *New York Times v. Sullivan* and *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974), can have no bearing upon this case.

II. WAS THE PETITIONER DENIED EQUAL PROTECTION BECAUSE THE TEXAS SUPREME COURT DISMISSED HIS APPLICATION FOR WRIT OF ERROR?

The petitioner argues that the Texas statutes (Articles 1728 and 1821) which partially limit the jurisdiction of the Texas Supreme Court in slander cases, but not in libel actions, denied him equal protection. This issue is not a proper one for review.

A. There Is No Conflict Of Decisions.

Petitioner cites decisions, which state, as all decisions do, general propositions of law, but not one conflicts with the decision in this case. Petitioner has not even attempted to demonstrate a conflict. Consequently, he presents no reason for the granting of his petition. U.S. Sup. Ct. Rule 17, 28 U.S.C.A.

B. The Equal Protection Issue Was Not Raised Seasonably In The State Courts.

In petitioner's application for writ of error in the Texas Supreme Court, he made no complaint that the statutes which limited that court's jurisdiction in slander cases were unconstitutional. (Pet. App., pp. A-6 through A-9.) When petitioner filed his application in the supreme court, he knew in advance of Articles 1728 and 1821, that they partially limited that court's potential jurisdiction

over his appeal, and that he was required to allege and demonstrate jurisdiction. Yet he remained silent on this point. He waited until after the supreme court dismissed his application for want of jurisdiction to raise the matter in his motion for rehearing. (Pet. App., pp. A-2 through A-4.) This issue should not, therefore, be the reason for granting certiorari. *Radio Station WOW v. Johnson,* 326 U.S. 120, 128 (1945).

C. The Statutes Rest On Grounds Relevant To The Achievement Of The State's Objective.

In *Lindsey v. Normet,* 405 U.S. 56 (1972), an Oregon statute, which provided for expedited forcible entry and detainer actions, was attacked by tenants on grounds of denial of equal protection. This Court held that the classification of tenants of real property differently from other tenants for purposes of such possessory actions would offend the equal protection safeguard *only* if the classification rested upon grounds *wholly* irrelevant to the achievement of the state's objective. Does the legislative classification made in the case of Articles 1728 and 1821 rest upon grounds relevant to the achievement of the state's objective? Fortunately, this question was answered by the Supreme Court of Texas when it considered the predecessor to these statutes. In *A. H. Belo & Co. v. Smith,* 42 S.W. 850, 851 (1897), the court gave several reasons for the distinction between slander and libel cases, but it seems that the most important was, and still is today:

> Written defamation is in its nature lasting and may be read by many, while oral defamation is ordinarily heard by but a few persons. It is obvious, therefore, that in the former the injury is likely to be more serious, and the damages greater.

The petitioner has failed to demonstrate that the "classification rests on grounds *wholly* irrelevant to the achievement of the state's objective." In fact, *A. H. Belo & Co. v. Smith* conclusively establishes the antithesis.

D. The Petitioner Was Not Harmed By The Texas Supreme Court's Dismissal Of His Application For Writ Of Error.

Under the first issue presented by petitioner, he argues that he was denied an independent review of the jury's finding of actual malice. In her discussion of that issue above, respondent delineated the differences between a no evidence (legal insufficiency) point of error and a factual insufficiency point.

Had the Supreme Court of Texas taken jurisdiction of petitioner's appeal, it could not have granted him the broader factual sufficiency review of all the evidence (as did the court of appeals) because its jurisdiction is limited to no evidence points of error. *Garza v. Alviar,* 395 S.W.2d 821, 823 (Tex. 1965). Only a court of appeals can consider a factual insufficiency point. Consequently, petitioner was not and could not have been harmed by the supreme court's refusal to grant his application for writ of error. And in any event, he was afforded a plenary review of the actual malice question by the court of appeals when it considered his factual insufficiency point.

———o———

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

Bruce Robertson, Jr.
1825 National Bank of Commerce Building
San Antonio, Texas 78205
(512) 225-4001

Counsel of Record for Respondent

APPENDIX

NO. 04-82-00144-CV

IN THE COURT OF APPEALS
FOR THE
FOURTH SUPREME JUDICIAL DISTRICT
SAN ANTONIO, TEXAS

DAVID BOLLING,
Appellant

V.

RITA BAKER,
Appellee

TO THE HONORABLE JUSTICES OF THE COURT:

NOW COMES appellant David Bolling and files this Appellant's Brief.

POINTS OF ERROR

POINT ONE

The trial court erred in rendering judgment against Dr. Bolling and in failing to grant a new trial because (1) a qualified privilege was conclusively established, and (2) the evidence is legally and factually insufficient to support the jury's finding of "knowledge of falsity or reckless disregard of the truth."

POINT TWO

The trial court erred in failing to submit Dr. Bolling's requested definition of "reckless disregard."

POINT THREE

The trial court erred in rendering judgment against Dr. Bolling and in failing to grant a new trial because (1) as a matter of law, the jury's finding of malice defined as "ill will" neither overcomes the qualified privilege nor justifies exemplary damages, or alternatively, (2) the evidence is legally and factually insufficient to support that finding.

POINT FOUR

The trial court erred in admitting repetitive evidence that Dr. Bolling performed abortions, and such errors were harmful.

POINT FIVE

The trial court erred in overruling Dr. Bolling's objection to Ms. Baker's attorney's final argument, which referred to Dr. Bolling as "ashamed of his profession," and such error was harmful.

POINT SIX

The trial court erred in excluding evidence that Ms. Baker had written bad checks, and such error was harmful.

POINT SEVEN

The trial court erred in rendering judgment based on the jury's findings of compensatory damages and in fail-

ing to grant a new trial because the evidence is legally and factually insufficient to support findings that damages were sustained.

POINT EIGHT

The jury's awards of compensatory damages are excessive and were influenced by passion or prejudice, thus the trial court erred in failing to grant a new trial.

POINT NINE

The jury's awards of compensatory damages are excessive and the trial court erred in failing to suggest a remittitur.

POINT TEN

The trial court erred in rendering judgment against Dr. Bolling for exemplary damages and in failing to grant a new trial because the evidence is legally and factually insufficient to support the jury's finding of malice as defined as "ill will."

POINT ELEVEN

The jury's award of exemplary damages is excessive and influenced by passion or prejudice, thus the trial court erred in failing to grant a new trial.

POINT TWELVE

The jury's award of exemplary damages is excessive and the trial court erred in failing to suggest a remittitur.

NO. 04-82-00114-CV

IN THE COURT OF APPEALS
FOR THE FOURTH SUPREME JUDICIAL DISTRICT
SAN ANTONIO, TEXAS

DAVID BOLLING,
Appellant

V.

RITA BAKER,
Appellee

APPELLANT'S MOTION FOR REHEARING

TO THE HONORABLE JUSTICES OF THE COURT:

Appellant David Bolling respectfully presents this motion for rehearing in connection with the court's opinion of February 22, 1984.

POINTS OF ERROR

Point One

The court of appeals erred in holding that the jury's award of damages can be legally supported by a presumption of injury, because there is uncontroverted evidence rebutting the existence of injury.

Point Two

The court of appeals erred in holding that the statements in question were slanderous per se and that damages could be recovered in the absence of actual injury.

Point Three

The court of appeals erred in affirming the trial court's judgment because the evidence is legally and factually insufficient to support findings that actual injury and damages were sustained.

Point Four

The court of appeals erred in holding that a recovery of damages for slander is constitutionally permissible in the absence of proof of injury.

Point Five

The court of appeals erred in refusing to hold that the jury's awards of compensatory and punitive damages are excessive.

Point Six

The court of appeals erred in holding that the evidence is legally and factually sufficient to support the jury's finding of "knowledge of falsity or reckless disregard of the truth", which is essential to liability when there is a qualified privilege.

Point Seven

The court of appeals erred in affirming the trial court's judgment because, as a matter of law, the jury's finding of malice defined as "ill will" neither overcomes the qualified privilege nor justifies exemplary damages.